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# Texas Cities Can Enforce State-Level Air Pollution Laws

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In 2007, Houston created its own air quality program to enforce at the municipal level laws that the state would not. A local trade group with a masterfully euphemistic name – the Business Coalition for Clean Air (BCCA) – sued the city and argued that state air quality statutes preempted the program. The city claimed that BCCA had filed the action because it “currently enjoys what it perceives to be a permissive regulatory approach from the [Texas Commission on Environmental Quality (TCEQ)].”

The Bayou City lost in district court but last week won an appeal, in a decision that should give hope to Texas cities that want to breathe life into neglected state air quality laws. In *City of Houston v. BCCA Appeal Group, Inc.*, 2013 Tex. App. LEXIS 11089 (Tex. Ct. App. Aug. 29, 2013), the First District Court of Appeals held that, as a home rule city, Houston has police power authority to enforce the Texas Clean Air Act of 1967 (TCCA).

The court explained that the TCCA gives TCEQ the sole authority to issue permits for air contaminants. However, it empowers local governments to enforce the TCEQ’s rules. Texas Health & Safety Code § 382.111. In addition, it reserves for home rule cities the power to “enact and enforce an ordinance for the control and abatement of air pollution” as long as the ordinance is consistent with the TCCA and TCEQ rules. Texas Health & Safety Code § 382.113.

In 1992, Houston passed an ordinance for air pollution not covered by the TCCA. In 2007, it amended that ordinance to: (1) incorporate TCEQ air regulations by reference; (2) require polluting facilities to register with the city; (3) fine facilities that do not register; (4) direct municipal health officers to enforce; and (5) threaten to punish noncompliance with civil and administrative sanctions. Houston, Tex., Ordinance 2007-208 (Feb. 14, 2007).

Home rule cities like Houston derive their power from the Texas constitution (Art. XI, § 5) rather than from legislative enactments. If the legislature wants to limit their authority, it has to do so with “unmistakable clarity.”

BCCA contended that, while the TCCA did not expressly limit local governments, it was so comprehensive as to occupy the field and implicitly preempt Houston from: (1) operating a concurrent registration scheme that would bar an unregistered facility from engaging in activities the TCCA would otherwise condone; or (2) overriding TCEQ’s discretion by enforcing laws the state agency had decided not to enforce.

The appellate court rejected the first argument on the grounds that “[e]ven when the Legislature gives an administrative agency extensive authority to regulate a given subject-matter, a municipal ordinance that establishes a parallel registration, licensing, and/or permitting program is not necessarily preempted.” The court pointed to *Unger v. State*, 629 S.W.2d 811 (Tex. Ct. App. 1982), which held that a home rule city could use its police powers to prohibit oil wells within city limits even though the legislature had given the Railroad Commission broad jurisdiction over oil and gas production. “The oil and gas industry in Texas is heavily regulated and if the Legislature did not preempt the field with respect to the location of oil and gas wells within the state’s borders, as it clearly did not, based upon *Unger*, then it certainly did not do so here with unmistakable clarity.”

The BCCA court distinguished the ordinance before it from another Houston environmental ordinance that the Texas Supreme Court found preempted in its recent decision [S. Crushed Concrete, LLC v. City of Houston](#), 398 S.W.3d 676, 679 (Tex. 2013). That ordinance required a concrete-crushing facility that had already received a TCEQ air permit to apply for a more restrictive municipal land use permit. The *Crushed Concrete* court [concluded](#) that the municipal permitting process – though oriented toward land use rather than air emissions – [had the effect](#) of holding industry to a higher standard than the state had set.

The BCCA ordinance, in contrast, “is the City’s attempt to create a concurrent regulatory scheme or permitting process through which it will enforce the state’s existing rules and regulations. In fact, the City acknowledges that its decision to regulate and enforce the TCAA and TCEQ rules and regulations on its own in this case –rather than in cooperation with TCEQ – is due to what it perceives as TCEQ’s lax enforcement efforts.”

The court declined to accept BCCA’s second argument (the ordinance subverted TCEQ’s statutorily granted discretion) by observing that the ordinance required municipal enforcement officers to defer to TCEQ decisions. “If conduct is not unlawful under state law, as determined by TCEQ, it is not unlawful under the Ordinance.”

### Impact of Decision

BCCA provides assurance that home rule cities can enforce the TCAA even if the state does not. It gives no comfort to local governments with lesser police powers (like counties or general law cities). Nor does it act as reliable precedent for other environmental statutes that do not, like the TCAA, expressly reserve authority for home rule cities.

Still, it ensures that large Texas cities with the political inclination and administrative resources can enforce orphaned TCCA regulations and maintain a baseline of ecological and public health protections.

Presumably, BCCA will appeal to the Texas Supreme Court, which despite its relatively [unfavorable view](#) toward environmental regulation in recent years could well uphold the decision.

If the high court had wanted to invalidate ordinances like the one at issue in BCCA, it could have reached a broader holding in *Crushed Concrete*; that it did not could signal a willingness to tolerate local air enforcement actions.

Additionally, because the BCCA decision pivots on the police powers doctrine, it could be difficult for the court to come out against Houston without chipping away at police powers and local control more generally.

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